KEYNOTE ADDRESS HONORABLE JAMES J. GILVARY SYMPOSIUM ON LAW, RELIGION & SOCIAL JUSTICE: EVOLVING STANDARDS OF DECENCY IN 2003—IS THE DEATH PENALTY ON LIFE SUPPORT?

Professor Erwin Chemerinsky[*]

It's a tremendous honor and pleasure to be with you. I think that every professor has one class that he or she remembers as the very best that he or she has ever taught. For me it was my Constitutional Law I class in the spring of 1985. That class did more to change USC law school than any other in the twenty years that I've been there. It created the Public Interest Law Foundation, it created the Loan Forgiveness Program for students doing public interest law. And the star of that class was Lisa Kloppenberg who became the editor-in-chief of the Law Review. And I've been a law professor for twenty-four years now, and I've never had a better student than Lisa. So it is just an enormous pleasure to be here where Lisa is the dean. It's, of course, also a very special honor to be asked to deliver at the Gilvary lecture. I know that Judge Gilvary did so much to help the University of Dayton Law School.

In 1994, about six months before he retired from the United States Supreme Court, Justice Harry Blackmun wrote the following words: "Twenty years have passed since this Court declared that the death penalty must be administered fairly and with reasonable consistency or not at all, and despite the efforts of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake."[1] He then said no longer would he tinker with the machinery of death, he would vote every case that a death sentence was cruel and unusual punishment.

Justice Blackmun's words received enormous national media attention, but they had no measurable effect on the Supreme Court for how it was handling death penalty cases. Despite Blackmun's eloquent pronouncement, the Supreme Court continued to deny review in most death penalty cases. When it granted review, it overwhelmingly affirmed the death sentences and didn't reverse very many at all.

In fact, I think the Supreme Court's handling of the death sentences in this time period and in the years before this might best be described as a deregulation approach. The Court set broad guidelines that states had to

---

[*] Sydney M. Irmas Professor of Public Interest Law, Legal Ethics & Political Science at the University of Southern California Law School.

[1] *Callins v. Collins*, 510 U.S. 1141, 1143-44 (1993).

follow, but so long as they stayed within it, the Court was going to uphold the death sentences.

Indeed, I would say for about twenty-five years, from 1976 to the early years of the twenty-first century, this was the dominant approach of the Supreme Court. Hard to identify hardly any cases in this quarter century period where the Supreme Court ruled in favor of capital defendants or articulated rules that would help capital defendants in lower courts.

But in just within the last couple of years, this trend seems to be changing. In June of 2002, in *Atkins v. Virginia*,[2] the United States Supreme Court held that the death penalty for the mentally retarded is cruel and unusual punishment and thus, unconstitutional. In the same month of June 2002, in *Ring v. Arizona*,[3] the Supreme Court held that a jury and not the judge must find the aggravating factors that warrant imposition of the death sentence. And in June of 2003, in a case called *Wiggins v. Smith*,[4] the Supreme Court found a death sentence to be unconstitutional because of ineffective assistance of counsel. The failure of an attorney to investigate psychological abuse of the defendant as a child and the failure of the attorney to present that to the jury was deemed a basis for overturning the death sentence.

What I want to talk about tonight, these three cases, what they're likely to mean for the death penalty in the United States. My thesis is that these three cases signify a Court that for the first time in decades seems to want to perfect the administration of the death penalty in the United States.

Now, I don't want to make too much of three cases over a two-year period. I don't think that there's any Justice on the current Court who would take the position articulated by Justice Blackmun, and before that, Justices Brennan and Marshall, that the death penalty is inherently cruel and unusual punishment; but I do think that these three cases mark a change in the Court's approach to capital punishment.

What I'd like to do is develop four points this evening in talking about the death penalty and Constitutional interpretation. First I want to argue that the death penalty as administered in the United States is seriously flawed. Second, I want to suggest that these three recent cases signify a Court that recognizes at least some of the problems with regard to the death penalty. Third, I want to talk about the likely implications of these cases for the death penalty in the coming years. And fourth, I want to consider what the implications of these cases might be outside of the area of the death penalty in other aspects of criminal procedure.

---

[2] 536 U.S. 304 (2002).

[3] 536 U.S. 584 (2002).

[4] 539 U.S. 510 (2003).

Now, at the outset, I should make clear what I'm not talking about. I'm not going to discuss whether the death penalty overall is a good or a bad idea. I'm not going to be talking about the morality of the death penalty, though, that's something that needs to be and should be much discussed. My focus is really on these three cases and descriptively what they're likely to mean and normatively what they should mean.

So as to my first point that the death point as administered in the United States is significantly flawed, I want to discuss here three main problems, but there's many that are worth attention. I want to talk about how innocent people get sentenced to death and even executed in the United States. I want to talk about the tremendous problems in providing adequate attorneys for those who are facing death sentences and execution. And I want to talk about the racism of the administration of the death penalty in the United States. These, of course, are interrelated.

With regard to the execution of innocent people, the work of Innocence Projects across the country have brought to public attention people who are wrongly convicted and then sentenced to death.

In Illinois alone, the Innocence Projects were able to show over a dozen individuals who were unquestionably wrongly convicted and then sentenced to death. As a result of these cases, the then governor of Illinois, Governor Ryan, imposed a moratorium on the death penalty in that state and before leaving office, as you know, he commuted the death sentences of all on death row in Illinois.

There's nothing uniquely bad about the procedural system or the courts in Illinois compared to any other state. There's no doubt that if there was close examination of those on death row anywhere in the country similar cases could be found.

The leading study that's been done on the execution of wrongly convicted individuals and the conviction of these individuals was done by Hugo Bedau and Michael Radelet. They found that between 1900 and 1991, four hundred and sixteen unquestionably innocent people were sentenced to death in the United States. They identified thirty of these cases where individuals were found to be innocent only hours or days before the scheduled execution. They've documented twenty-three of these cases where innocent people were executed by the state.

The reality is that any human system will make mistakes, especially a system with as many problems as our criminal justice system. Sometimes innocent people are wrongly convicted because of police or prosecutorial misconduct. Sometimes it's proven in these cases that the police fabricated evidence or that prosecutors withheld evidence in violation of their constitutional obligation.

Sometimes it's problems with eyewitness identification. Eyewitness

identification is tremendously powerful in a courtroom when someone points to a defendant and says he's the one. That has tremendous sway with the jury. And yet we know that eyewitness identification is often flawed, especially cross-racial eyewitness identification is often wrong.

Sometimes it's simply the wrong person in the wrong place at the wrong time, getting convicted for a crime that he or she didn't commit. But for whatever reason, the reality is there are innocent people on death row today.

Related to this is the second problem that I identified, the problem with effective assistance of counsel. Of course, one of the key reasons why innocent people get convicted is the lack of a good lawyer. There are many studies that have been done comparing capital defendants who have privately-retained counsel as opposed to court-appointed counsel.

A study that was done in Florida found that the single largest variable that would predict whether a capital defendant would be sentenced to death or not is whether or not that person had a privately-retained counsel or a court-appointed lawyer.

A study that was done in Georgia found that those who had court-appointed lawyers were 2.6 times more likely to be sentenced to death than those who had privately-appointed lawyers.

There was a study done of one hundred and thirty-one individuals who were executed during the governorship of George W. Bush. And it found that of those one hundred and thirty-one who were executed, forty-three had an attorney who had previously been disciplined by the Bar for misconduct, and forty of those who had been convicted had a lawyer who presented no evidence in their behalf or at most, one witness in their behalf.

The late Justice Thurgood Marshall talked about capital defendants being represented by lawyers who had no prior experience trying criminal cases or who were handling their first death penalty case. We know of instances of lawyers in capital cases representing the defendant who literally slept through the trial. There's a famous case out of the Fifth Circuit, *Burdine v. Johnson*,[5] where astoundingly two of three judges on the Fifth Circuit and then five judges in an en banc consent said it was not ineffective assistance of counsel when the defense lawyer slept through a good deal of the trial. Of course, if that's effective assistance of counsel, then virtually anything would be deemed sufficient.

The reality is court-appointed lawyers handling death cases are often tremendously inadequately compensated. Leading death penalty attorney Steven Bride said in Alabama, a court-appointed lawyer to handle a capital

---

[5] 231 F.3d 950 (5th Cir. 2000), vacated 262 F.3d 336 (5th Cir. 2001).

case gets paid on the average twenty dollars an hour; but that's better than Mississippi where Mr. Bride says the average compensation by his calculation is eleven dollars and fifty cents an hour.

And the right to an attorney is only in the trial and in the direct appeals. There's no right to an attorney under the United States Constitution for collateral review, state and federal habeas corpus.

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act and it tried to streamline collateral proceedings—habeas corpus proceedings to review death penalty cases. And in general the law said that those who want to bring a habeas corpus petition to Federal Court have one year after the completion of state proceedings to do so. The law said, though, that a capital defendant would only get six months to bring a habeas petition, sort of a perverse way of saying death is different, we'll give people facing death less time to bring their habeas petition; but the law said only if the State provides for attorneys for collateral review habeas corpus challenges to the death sentence.

We're now seven years after the enactment of this law, and no state has yet provided attorneys on collateral review to qualify for the shortest statute of limitation in death cases.

Of course, there are other problems too with representing capital defendants. Only three states by statute create a right for expert assistance in the penalty phase of capital cases. This is the ability to pay an expert witness to evaluate the defendant so as to present key mitigating circumstances.

All of this together adds up to a tremendous embarrassment and often a tragedy of the capital system in America: the lack of effective attorneys.

The third problem that I want to talk about with regard to the death penalty in the United States is the racism that's inherent to its administration. Racism in the criminal justice system is not unique to death penalty cases. In fact, I think to understand the racism with regard to the death penalty, it must be put in the context of the more general racism in the criminal justice system.

Let me just point to a few studies that confirm this. There's a study that was done in Memphis, Tennessee, and it found that an African-American was ten times more likely to be shot by a police officer than a white individual in that city, eighteen times more likely to be wounded, and five times more likely to be killed by a police officer.

A study that was done in Minnesota found that white criminal defendants with a criminal record were much more likely to get released on bail than African-American criminal defendants without a prior criminal record.

A national study of sentencing in the United States found that on the

average, an African-American sentence was ten percent longer than a white defendant's sentence for the same crime holding constant prior criminal records.

The National Sentencing Commission found with regard to the Federal Courts, the average sentence for white defendants was 44.7 months and the average sentence for black defendants was 68.5 months.

In any aspect of the criminal justice system where there's discretion, racism will manifest itself. And there's tremendous discretion with regard to the death penalty. There's discretion as to whether or not the prosecutor will seek the death penalty. There's discretion as to whether the jury will find aggravating factors that outweigh mitigating circumstances and recommend imposition of the death penalty. There's discretion as to whether the Judge will allow the imposition of the death penalty. And statistics show that at every phase, racism affects the capital sentencing system.

A study by David Baldus at the University of Iowa found that prosecutors sought the death penalty seventy percent of the time when it was a black defendant and a white victim, fifteen percent of the time if it was a black defendant and a black victim, nineteen percent of the time if it was a white defendant and a black victim. It's a huge disparity.

Baldus found, looking at the state of Georgia, that those who murdered whites were four times more likely to have a death sentence imposed than those who murdered blacks. In Alabama, the State's population is twenty-four percent African-American, but death row is forty-three percent black in Alabama.

A national study that was done found that killers of whites were three times more likely across the country to have the death sentence imposed than those who killed African-Americans.

In the state of Florida, though, killers of whites were ten times more likely to have the death sentence imposed than killers of blacks.

And all of these studies found that African-American defendants were much more likely to be charged with a capital crime, prosecuted with a capital crime, and sentenced to death than white defendants holding all other variables constant.

This is the reality of the death penalty as we speak in October of 2003.

Let me now move from talking about these problems to the second part of my remarks. What I want to address is how I think the Supreme Court has begun to recognize some of these problems in its recent death penalty cases.

At the outset, in my introduction, I mention the three cases from the last two terms. I think to appreciate how significant they are, you've got to

put them into the context of what the Supreme Court has done with the death penalty over the last several decades.

In 1972, in *Furman v. Georgia*[6] in a five-four decision, the Supreme Court held that the death penalty as then administered violated the cruel and unusual punishment clause—the Eighth Amendment.

Law professor and litigator Anthony Amsterdam argued the case to the Supreme Court. One of the justices were later quoted as saying it was the finest oral argument that he ever heard. Amsterdam argued that the death penalty as administered then was racist. He pointed out that in the prior fifty years ninety percent of those who had been sentenced to death for rape had been African-American. Fifty percent of all of those that had been sentenced to death had been African-American.

Additionally, Amsterdam said that the death penalty as administered was essentially a lottery, no standards of limiting discretion, it's very much the luck of the draw in terms of the prosecutor, the judge, the jury.

Amsterdam argued to the Court that the evolving standards of decency that inform Eighth Amendment jurisprudence made the death penalty unconstitutional.

Justices Brennan and Marshall accepted the latter argument, and they took the position that the death penalty inherently violates the Eighth Amendment. They adhered to that position until each of them left the Supreme Court.

Justices Byron White and Potter Stewart, who are also part of the majority, focused on the arbitrary and capricious nature of the way the death penalty was administered. And Justice William O. Douglas, the fifth justice for the majority, talked about the discriminatory fashion in which the death penalty was administered.

There was then a moratorium on executions in the United States. There was a tremendous outcry, especially in southern states, against *Furman v. Georgia*, and the Supreme Court revisited the issue in 1976, four years later.

A number of states had revised their death penalty statutes in the interim. In *Woodson v. North Carolina*,[7] the Supreme Court said a mandatory death penalty is unconstitutional; but in *Gregg v. Georgia*,[8] the Supreme Court said a death penalty can be constitutional so long as it meets some procedural requirements. The Court described how there should be a guilt phase, followed by a penalty phase. The Court talked

---

[6] 408 U.S. 238 (1972).

[7] 428 U.S. 280 (1976).

[8] 428 U.S. 153 (1976).

about how in the penalty phase the prosecutor should have to present evidence of aggravating factors that would warrant the imposition of the death penalty, the defendant to present mitigating circumstances that would point in the opposite direction.

After *Gregg v. Georgia*, the Supreme Court then engaged on what I referred to in my introduction as deregulation of the death penalty. There were to be, sure, some cases where the Court imposed additional limits on the death penalty. In *Enmund v. Florida*,[9] in 1982, the Court limited the ability to impose the death penalty for felony murder—requiring proof of active participation by the defendant or at least intent on the part of the defendant.

But if you look at all of the death penalty cases from 1976 until 2002, the government won the vast, vast majority decided by the Supreme Court and indeed, even a far larger number involved the Supreme Court just denying review.

Let me give you a couple of examples to illustrate this tremendous deregulation. One case came from California in 1992. It was the first person to be executed in the state after the moratorium on the death penalty was lifted. It involved a man by the name of Robert Alton Harris.

On the Friday before his scheduled execution, at midnight on Monday night, a Federal District Court Judge in San Francisco, Marilyn Patel, granted a preliminary injunction to stop the death sentence based on the lawyers' argument that death in a gas chamber is cruel and unusual punishment. Harris' lawyers presented compelling evidence that the gas that's used in a death chamber is the same as was used in the Nazi concentration camps. They described the horrible physiological effects and the pain and suffering.

On Sunday night of that weekend, which was Easter Sunday, the three judges of the Ninth Circuit held a telephonic oral argument. On Monday morning, they released a decision that said based on *Younger v. Harris*[10] abstention, they were reversing the District Court. If you're a lawyer and you took Federal Courts in law school, if you're a law student, you had the class, you might remember *Younger v. Harris*. It says that a Federal Court cannot enjoin a pending State Court from criminal prosecution. It involved the ability of a Federal Court to stop a state prosecution under a particular California law.

The problem, though, with what the Court of Appeals was saying was there was no pending State Court case. *Younger v. Harris* had absolutely no application. And, in fact, after Harris was executed, that panel of the Ninth

---

[9] 458 U.S. 782 (1982).

[10] 401 U.S. 37 (1971).

Circuit ordered that their opinion not be published, they withdrew their opinion, it was clearly wrong.

That night, Monday evening, six hours before the scheduled execution, ten judges on the Ninth Circuit issued a stay of the panel's decision to stop the execution pending the opportunity for en banc review, review by the entire Ninth Circuit review. Within a couple of hours, the United States Supreme Court overturned the stay by the ten judges. Then a single Judge of the Ninth Circuit issued his own stay on other grounds, which the Ninth Circuit then summarily reversed, and the Supreme Court ordered no more stays. Harris was executed about 4:00 a.m., just a few hours behind schedule.

The Ninth Circuit's legal arguments were completely wrong, and yet the Supreme Court didn't want to step in, didn't even want to allow the rest of the Court to review the decision.

Another example from this time a year later was the Supreme Court's case in *Herrera v. Collins*.[11] There the question is, is the execution of an innocent person unconstitutional. Now, you might say the answer to this is obvious. Of course, it violates the Constitution to execute an innocent person; but Chief Justice Rehnquist writing for the Court said the execution of an innocent person by itself doesn't violate the Constitution, that somebody to bring a habeas corpus petition has to also point to some other constitutional violation besides just a claim of his or her innocence. It's an astounding holding that I would think would trouble even the more ardent supporters of the death penalty.

Well, it's against this backdrop that what the Supreme Court has done the last two years is so striking. I'll talk about the three cases in a bit more detail. The first of the cases that I mentioned in 2002 was *Atkins v. Virginia*. As I said, the issue was whether the execution of the mentally retarded is cruel and unusual punishment. The Supreme Court in a six-three decision said such executions violate the Eighth Amendment to the Constitution.

Justice John Paul Stevens wrote the opinion for the Court. Chief Justice Rehnquist and Justices Scalia and Thomas were the only dissenters. Justice Stevens' opinion pointed to many reasons why this was cruel and unusual punishment. He said that the standard for deciding what's cruel and unusual punishment is the evolving standards of decency. He said there's many things that point to our evolving standards that make the death penalty for the mentally retarded unconstitutional.

He pointed to the number of states that have prohibited the death penalty of the mentally retarded. At that point it was eighteen states and

---

[11] 506 U.S. 390 (1993).

also the federal death penalty law. He pointed to opinion polls that showed that in the United States most of those that would support the death penalty don't favor the death penalty for the mentally retarded. He pointed to customs internationally as disapproving such executions.

He talked about how when the mentally retarded are sentenced to death, there's a much greater risk than an innocent person will be executed. He talked about how the people with serious mental disabilities have less ability to work competently with their attorneys. He talked about how people with serious mental disabilities are more likely to make false confessions and false incriminating statements.

Justice Stevens said that the death penalty for the mentally retarded serves none of the goals of the criminal justice system of punishment. He said one of the reasons we punish people is to deter. It's unlikely that a person with an IQ of sixty-five will be deterred by the existence of the death penalty.

He talked about how we have the death penalty for the sake of retribution, but why we can't find moral culpability and moral blame when a person is mentally retarded. And based on all of this, the Supreme Court said such executions violate the Eighth Amendment.

The second case that I mentioned in my introduction was *Ring v. Arizona* where the Supreme Court said that a jury, not the Judge, must find the aggravating factors that warrant the imposition of the death sentence.

To understand this, you need to know of another Supreme Court case from just a couple of years earlier, from June of 2000, called *Apprendi v. New Jersey*.[12] *Apprendi* involved a man in New Jersey who fired a gun into a home that was owned by an African-American family. Thankfully nobody was injured by the shooting. The individual was apprehended by the police, he made an incriminating statement, he said he shot the gun because he didn't want a black family living in his neighborhood. He agreed to plead guilty to a crime that would have a sentence between five and ten years in prison.

New Jersey, though, like most states, has a hate crime law. It provides for greater punishments when it's proven that a crime was hate motivated. And so the Judge in Apprendi's case found by a preponderance of the evidence that Apprendi's crime was hate motivated and the judge imposed a twelve-year sentence. Apprendi had recanted his statement as to why he had done this.

The issue before the United States Supreme Court was does hate motivation have to be proven to a jury beyond a reasonable doubt or can it

---

[12] 530 U.S. 466 (2000).

be proven to the judge by the lower standard of just preponderance of the evidence.

The Supreme Court in a five-four decision, again, with Justice Stevens writing for the Court, said that the jury should have to find the hate factor and should have to find it beyond a reasonable doubt. It can't just be left to the judge. Justice Stevens emphasized the importance of trial by jury under the Sixth Amendment of our system. Justice Stevens emphasized the importance of proof beyond a reasonable doubt in protecting individuals.

So the Supreme Court said in *Apprendi*, any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum has to be proven to the jury beyond a reasonable doubt, not just to the judge.

Well, the issue in *Ring v. Arizona* was: are aggravating factors in a death penalty case ones that have to be proven to the jury beyond a reasonable doubt or can they just be found by the judge?

Arizona and four other states allowed these to be found entirely by the judge. In Arizona, the jury would find guilt and then the judge would hold the penalty phase and the judge alone would decide if there were aggravating factors and whether to impose a death sentence.

And, in fact, in a case called *Walton v. Arizona*,[13] the Supreme Court had upheld that. In *Ring v. Arizona*, in June 2002, the Supreme Court overturned *Walton v. Arizona*. Here, Justice Ruth Bader Ginsburg wrote the opinion for the Court. There were only two dissents, Justices Scalia and Thomas.

Justice Ginsburg's opinion said that a finding of aggravating factors, sufficient to warrant a death sentence, in essence, makes it a different crime than the same behavior where a death sentence is not imposed.

In our legal system, juries rarely play any role in sentencing, other than in capital cases. If Ring had been sentenced to life in prison, no one would say that the jury had to play any role in sentencing, the jury's entire function would be adjudicating guilt; but Justice Ginsburg in *Ring* says it's the jury's providence and it must be the jury's responsibility to find aggravating factors beyond a reasonable doubt.

And as you might have read in the newspaper just about three weeks ago an en banc decision of the United States Court of Appeals for the Ninth Circuit found that *Ring* applies retroactively; it applies to those who were sentenced to death prior to the Supreme Court's decision.

The final case that I want to talk about is *Wiggins v. Smith* decided on June 26 of this year. Wiggins was tried for a capital crime. In his opening statement, his lawyer said to the jury that there would be evidence

---

[13] 497 U.S. 639 (1990).

presented, if it ever got to a capital case, that Wiggins had been abused as a child and that this abuse was important in mitigating the circumstances that would warrant imposition of the death sentence.

Well, Wiggins was convicted, there was a penalty phase, but no such psychological evidence was presented. In fact, the lawyer for the defendant never conducted an investigation of any sort as to Wiggins' childhood, his background, his psychological state, or whether he had been abused.

A habeas corpus petition was presented challenging the death sentence. Then it was appealed to the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit said there was no ineffective assistance of counsel here. The Fourth Circuit said the defense lawyer made a strategic choice to not do an investigation, to not present the evidence, and a strategic choice by a lawyer does not count as ineffective assistance of counsel.

The Supreme Court, again, in a seven to two decision reversed the Fourth Circuit and found ineffective assistance of counsel. Here, Justice Sandra Day O'Connor wrote for the Court. Again, only Justice Scalia and Thomas dissented.

Justice O'Connor said that the Court was not creating any new rules, rather it was going to apply the well-established test for ineffective assistance of counsel under the Supreme Court's decision in *Strickland v. Washington*[14] showing first that the counsel's performance was so inadequate as to violate the Sixth Amendment and next that the defendant was prejudiced by this.

And Justice O'Connor explained why the failure to conduct an investigation here, how the defendant had been treated as a child and abused as a child, did not meet the appropriate standards of performance by a lawyer, so much so as to count as ineffective assistance of counsel.

These three cases are the first major ones in almost a quarter century where the Supreme Court has overturned death sentences, and I think that they are an important sea change with regard to the Supreme Court's handling of death penalty cases.

And to talk about that, I want to move to my third point, the implications from these cases. Now, at the outset, I'd say a couple of things are striking about these cases. One is that the Supreme Court expressly recognizes the problems with the death penalty in the United States in these decisions.

For example, in *Atkins v. Virginia*, in footnote 25, Justice Stevens writes, "we cannot ignore the fact that in recent years a disturbing number

---

[14] 466 U.S. 668 (1984).

of inmates on death row have been exonerated"[15] showing that the Court is cognizant of the work of the Innocence Projects, of innocent people being put to death.

With regard to ineffective assistance to counsel, Justice Sandra Day O'Connor gave a speech a couple of years ago, when she said it may be time to set minimum standards for attorneys handling capital cases. Though, she didn't say that in *Wiggins v. Smith*, it was undoubtedly reflected in her decision. Traditionally, it's been enormously difficult to prove ineffective assistance of counsel.

A former colleague of mine, who is now a professor at Yale, Denny Curtis, said that he thought if we read all the cases, that the standard for effective assistance of counsel is if you held a mirror in front of the mouth of the defense lawyer, would you get a breath, would you see a mist. If so, then that's effective assistance of counsel. And that's not much of an exaggeration, especially, again, when you think of cases like *Burdine* where the Fifth Circuit said defense counsel's sleeping through trial is not ineffective assistance of counsel.

But the standard in *Wiggins v. Smith* is much more aggressive, much more inquiring with regard to what's ineffective assistance of counsel. This wasn't a lawyer who slept through the case, there wasn't an incompetent lawyer, it was a lawyer who failed to conduct an investigation, and the Court was willing to say that's ineffective assistance of counsel.

Thus, I have to think that these three cases are a recognition on the part of the Court of at least some of the problems that I identified and that many others have identified with the administration of the death penalty.

There's another way in which I think these cases are important, and that's the rejection of originalism within them. For the last quarter century, conservative constitutional scholars have espoused a philosophy of constitutional interpretation which they call originalism.

Originalism says that the rights protected under the Constitution are limited to those that are stated in the text and those that were intended by the framers. Originalists would say that protection of any rights beyond these are illegitimate by the Court.

Justices Scalia and Thomas, not surprisingly, are the primary advocates of originalism on the United States Supreme Court. And there are countless decisions of the Court in many different areas of constitutional law that are either tinged with originalists' rhetoric or based on the originalist philosophy.

Justice Scalia is fond of saying that the death penalty can't be

---

[15] 536 U.S. at 321 n. 25.

unconstitutional because the text of the Constitution contemplates the death penalty. The Fifth Amendment talks about when can the Government take away life or limb. The death penalty existed at the time the Constitution was ratified, and Scalia would say, therefore, it can't be unconstitutional. Now, of course, ear cropping and flogging were also in existence in 1787, and I'm not sure that the Court ever would be willing to uphold such punishments.

Well, what's significant about the three cases that I mentioned is that in none of them does the majority of the Court articulate an originalist philosophy. In *Atkins*, Justice Stevens' majority opinion speaks of the evolving standards of decency. That's really the antithesis of an originalist philosophy. In fact, once the Court embarks on finding and then protecting the evolving standards of decency, that's inherently open-ended.

In *Ring v. Arizona*, the Court based its decision on its interpretation on what a trial by jury and proof beyond a reasonable doubt mean, but it can't be based on anything literally in the text of the Constitution or intended by the framers.

And in *Wiggins*, in finding ineffective assistance of counsel, the Supreme Court overturned a death sentence based on a failure of an attorney, the sort that couldn't possibly have occurred two hundred years ago.

And so I think the broadest significance of these cases is in the methodology the Supreme Court used in coming to its conclusions.

Well, what are the likely, the desirable, implications of these cases. Let me sketch out several. First, the invalidation of the death penalty for crimes that were committed by juveniles.

In 1988, in *Thompson v. Oklahoma*,[16] the Supreme Court without a majority opinion said that the death penalty for crimes committed by those fifteen or younger was cruel and unusual punishment. But the next year, in *Stanford v. Kentucky*,[17] and by a five to four decision, the Supreme Court said it was not cruel and unusual punishment to impose the death penalty for crimes that were committed by a sixteen year old or a seventeen year old.

I think the next major challenge to the death penalty based on *Atkins* is going to be to death sentences imposed on those for crimes that were committed when they were sixteen or seventeen. There's over three hundred and fifty people now on death row in the United States for crimes that they committed when they were sixteen or seventeen.

---

[16] 487 U.S. 815 (1988).

[17] 492 U.S. 361 (1989).

Many of the things that Justice Stevens pointed to in Atkins can be applied to the death penalty for crimes committed by juveniles. Justice Stevens looked to international standards.

Well, the International Covenant on Civil and Political Rights prohibits the death penalty for juveniles, though, the United States, when it ratified it, added a reservation not agreeing to that part of the treaty. The Convention on Children's Rights specifically prohibits the death penalty for crimes committed by juveniles, and there's only two countries that haven't ratified that, the United States and Somalia.

This seems a strong indication of international practice, as evidenced by international treaties, practices in foreign countries. Indeed, there are only seven countries in the world that now allow the death penalty for crimes committed by juveniles, the United States being one of them.

Public opinion polls can be used as they were in *Atkins* to show that the death penalty for juveniles is cruel and unusual punishment.

Also, Justice Stevens in *Atkins* talked about how the mentally retarded are less able to work with attorneys, more likely to make falsely incriminating statements. The same could certainly be said for juveniles. Justice Stevens in *Atkins* talked about how the purpose of punishment aren't served by the death penalty for the mentally retarded. There's not deterrence, retribution doesn't apply. I think the same arguments can be made here.

Now, there are distinctions. There is a trend in the United States to states prohibiting the death penalty for the mentally retarded. There's not a similar trend with regard to executions for people who committed crimes while juveniles.

The Supreme Court had previously considered the death penalty of the mentally retarded before *Atkins* in 1989 in the *Penry*[18] case. At that time, only two states prohibited the death penalty for the mentally retarded. By the year 2002, it was up to eighteen states and the Federal Government, and that could provide strong evidence of the evolving standards of decency; but as Justice Stevens pointed out in footnote 18 in *Atkins*, only two additional states since '89, when *Stanford* was decided, have prohibited the death penalty for juveniles.

Last term, the Supreme Court had two cert petitions before it that raised the issue of whether it was cruel and unusual punishment to execute individuals for crimes they committed as juveniles. The Supreme Court denied certiorari in both of these cases. A denial of cert is not a precedent, it's always reading tea leaves to guess why, but perhaps there weren't the

---

[18] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

five votes yet to find this unconstitutional; and yet my hope is, based on the reasoning of *Atkins*, the factors that I just described, that the Supreme Court will do exactly that.

A second implication in the area of the death penalty that I would point to here is the constitutionality or more properly phrased the unconstitutionality of the federal death penalty.

The federal death penalty statute was adopted before *Ring v. Arizona* was decided in 2002. A federal district court in Vermont, in the case called *United States v. Fell*[19] found that the federal death penalty is unconstitutional based on *Ring v. Arizona*.

The district court pointed to many things. An indictment in federal court doesn't have to state the factors that would warrant the imposition of the death penalty. And most Courts have said that the *Apprendi* case that I mentioned requires that those factors that are going to lead to a greater sentence be pled in the indictment.

Also, the Federal Rules of Evidence don't apply in a capital sentencing hearing in federal court. Confrontation clause rights are not followed. Factors don't have to be proven to a jury beyond a reasonable doubt. And based on all of this Judge Sessions in *Fell* said the federal death penalty is unconstitutional.

Several districts have come to opposite conclusions, and the case is now pending before the United States Court of Appeals for the Second Circuit. I think there's a very strong argument that the federal death penalty statute as now written, as now administered is unconstitutional. I think the case will get to the Supreme Court.

You might remember that a couple of years ago, another judge within the Second Circuit, this time in New York City, found that the federal death penalty was unconstitutional as violating due process. This was a case called the *United States v. Quinones*,[20] and this was Judge Rakoff. He said that based on all of the information about the sentencing of innocent people to death, there were inadequate procedural protections to prevent the execution of the innocent and this violated due process. The Second Circuit in an opinion by Judge Cabranes reversed Judge Rakoff and said it did not violate due process. Other Courts have come to the same conclusion.

My guess is that the United States Supreme Court is not willing to go so far as to say that the death penalty as now constituted inherently violates due process; but I do think that it's likely and that it should happen that the

---

[19] 217 F. Supp. 2d 469 (D. Vt. 2002), *vacated*, 360 F.3d 135 (2d Cir. 2004).

[20] 196 F. Supp. 2d 416 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

Court says that the federal death penalty doesn't meet the standards of *Ring v. Arizona* and the federal death penalty statute needs to be revised.

A third implication that I would point to of the recent cases is a much more searching examination by the Court on a case-by-case basis of what's effective assistance of counsel and a requirement that lower courts engage in a much more searching review.

Prior to *Wiggins*, there were very few recent cases where the Supreme Court has found ineffective assistance of counsel. Justice O'Connor's majority opinion in *Wiggins* was emphatic that it wasn't creating or applying new law. And indeed, since it was before the Court on a writ of habeas corpus, they couldn't have been making or applying new law.

Under the current habeas corpus statute, a federal court can only grant habeas corpus relief if the state court decision is contrary to or an unreasonable application of clearly established federal law as announced by the Supreme Court.

So the Court in *Wiggins* says it was following well-established principles. And yet in practical reality, it *was* a different standard, a standard that requires that lower courts look much more carefully at the performance of counsel, at least in every death penalty case.

Finally, I think there needs to be and there will be reexamination of the role of race in the administration of the death penalty in the United States.

In *McCleskey v. Kemp*,[21] fifteen years ago, the Supreme Court said that it could not be proven that the death penalty violated equal protection by pointing to statistics of the sort that I quoted early in my lecture. In fact, the Baldus study about the administration of the death penalty in Georgia had been presented to the United States Supreme Court; but the Court in *McCleskey* by a five-four decision said that that wasn't enough to show a violation of equal protection.

It would have to be proven that either the State adopted the death penalty statute with the purpose of discriminating against racial minorities or that the particular jury in the case was racially motivated. That's an insurmountable hurdle. After all, you're not going to be able to prove that a death penalty statute was adopted for rationally discriminatory purposes, and rarely are you going to be able to get jurors to talk about why they decided the way they did, let alone to get them to admit that they imposed the death penalty for racist reasons.

The racism here is much more unconscious than conscious. *McCleskey* made it very difficult then to ever challenge a death sentence based on racism, based on a denial of equal protection.

---

[21] 481 U.S. 279 (1987).

But there's starting to be some recognition by the Supreme Court of problems with regard to racism in the criminal justice system. Here I mention another case to you decided by the Supreme Court in February of this year, a case called *Miller-El v. Cockrel.*[22] What this involves is an individual who was sentenced to death in the state of Texas, exhausted all of his appeals in the Texas courts, his conviction and sentence were affirmed.

His lawyer then presented a petition for a writ of habeas corpus, and the lawyer presented evidence that the prosecutor's office at the time had a policy of striking African-American jurors when it was an African-American criminal defendant. In fact, the defense lawyer found the prosecutor's manual of the time that instructed the lawyers to strike black jurors when there was a black defendant. There were declarations from prosecutors that had been in the office at that time that that was to be the appropriate policy.

But the federal district court denied the habeas petition and said evidence of overall policies of the prosecutor's office are irrelevant, all that matters is how the prosecutor behaved in this case. The United States Court of Appeals for the Fifth Circuit refused to even hear the appeal. They denied the certificate of appealability required for appellate review of a habeas corpus case.

But the Supreme Court in an eight-one decision reversed the Fifth Circuit. Justice Kennedy wrote for the Court. Justice Thomas was the sole dissenter. Justice Kennedy expressly said that the Fifth Circuit erred in denying a certificate of appealability. Then he went further and he said, to root out racism, it is appropriate for a criminal defendant to point to overall policy or practice of the office in addition to how it behaved in this specific case.

I don't want to make too much of *Miller-El v. Cockrel.* It doesn't overrule or even hint at overruling *McCleskey v. Kemp.* It was a different issue. But there's at least some recognition of the problem of racism in the criminal justice system.

In 1993, the House of Representatives passed a bill called the Racial Justice Act. It would allow an individual to challenge a death sentence by proving that it was posed in a discriminatory fashion using statistical evidence to show this.

In the area of employment discrimination, Federal Employment Law Title VII allows proof based on statistics of disparate impact. And you have housing law, Federal Law Title VIII, allows proof. You have voting law,

---

[22] 537 U.S. 322 (2003).

the 1982 Voting Rights Act Amendments, allows proof using statistics of disparate impact, but not with regard to the death penalty.

Unfortunately, it didn't get passed by the Senate and it hasn't been revived in the years since. But there does need to be a Racial Justice Act passed. It's a cruel irony that proof of discriminatory impact is enough to show discrimination in the areas like employment or housing and voting; but not when we're dealing with the most profound thing that a state can do, take away a person's life.

Well, the fourth and final part of my remarks are to address what are the possible implications of these recent cases for other areas besides the death penalty.

Now, at the outset here, the question is do these cases really have any implications outside the death penalty. Is death to be regarded as different with regard to criminal justice? Should there be a different set of rules for death penalty cases as opposed to all others.

For the quarter century that I labeled the era of deregulation of the death penalty, the Supreme Court was proud at proclaiming that death was not different when it comes to criminal justice, it was to be treated by the same rules as those followed throughout criminal cases.

As an example of this, you might remember a case a decade ago called *Coleman v. Thompson*.[23] Coleman was a man on death row, and he was there because his lawyer in filing an appeal missed the filing deadline by three days. He made an understandable miscalculation with regard to filing the petition for appeal, and the Virginia Court of Appeals refused to hear his appeal because the lawyer missed the filing deadline by three days. And the United States Supreme Court said that Coleman was not entitled to have his case heard in federal district court, federal court of appeals, or the United States Supreme Court because of this procedural default. The Court was saying that the rules for death penalty cases are the same as the rules for all other cases.

In *Atkins*, Justice Scalia in his dissent lamented that the Court was now following a jurisprudence of death being different. And this common sense argument that death should be treated as different in the criminal justice system, death, after all, is different than any other punishment because it's irrevocable. Any other mistake could to some extent be corrected, but not when somebody is executed.

And the principles of cases like *Atkins* are hard to apply outside the death penalty context. The Court says that execution of the mentally retarded is cruel and unusual punishment, but it's not about to say, I think,

---

[23] 501 U.S. 722 (1991).

that imprisonment of the mentally retarded is inherent cruel and unusual punishment.

And yet in another sense, a general approach that says that death is different doesn't make sense under the Constitution. Surely the Fourth Amendment rules with regard to search and seizure aren't going to be applied differently in capital cases than noncapital cases. The Fifth Amendment rights to grand jury indictment or the privilege self-incrimination aren't going to apply differently in death penalty than in nondeath penalty cases. Sixth Amendment rights, such as trial by jury and right to counsel, they have a radically different meaning in death penalty cases than in nondeath penalty cases.

And so it is likely that the recent Supreme Court decisions will have implications beyond just the death penalty context. For example, I think the more searching standard of *Wiggins v. Smith* with regard to ineffective assistance to counsel is going to play a role outside of the death penalty context. I think that criminal defendants who have been sentenced to less than death are going to be much more likely to succeed in showing ineffective assistance of counsel if courts follow and stay true to *Wiggins v. Smith*.

Just two days ago on Tuesday morning I was in the Ninth Circuit in a case that involved ineffective assistance of counsel. It was a woman that was sentenced to a long term in prison for killing her long term abuser. The defense lawyer didn't raise or even investigate the battered women's syndrome, and the argument was ineffective assistance of counsel.

And the core of the argument now is, based on *Wiggins v. Smith*, the failure of the defense lawyer to even investigate battered women's syndrome was ineffective assistance of counsel, *Wiggins* being the key.

And once the Court says that evolving standards of decency inform the Eighth Amendment and cruel and unusual punishment jurisprudence, then shouldn't that apply outside the death context as well? Here, unfortunately, the Court so far doesn't seem willing to go.

The Court last year had two cases before it involving when is a sentence so grossly disproportionate as to constitute cruel and unusual punishment. One of these cases was *Lockyer v. Andrade*.[24] Leandro Andrade was sentenced to life in prison with no possibility of parole for fifty years for stealing a hundred and fifty-three dollars worth of videotapes from Kmart stores in California.

Andrade went into a Kmart store and he stole five children's videotapes worth eighty-some dollars, he was seen on the overhead camera, he was

[24] 538 U.S. 63 (2003).

stopped as he was leaving the store, and the videotapes were taken away. Literally among his videotapes were *Sleeping Beauty* and *Snow White.*

Less than a week later he went to another Kmart store, he stole four children's videotapes worth seventy-some dollars. This time among them were *Free Willy 2* and *Batman Forever.* He was seen on the overhead camera, he was stopped as he was leaving the store, and the videotapes were taken away.

These crimes in California would normally be considered to be petty theft, stealing less than four hundred dollars worth of merchandise. Petty theft is punishable by no more than six months in jail. So two counts of petty theft adds up to a maximum sentence of a year in jail.

However, in California, if a person commits petty theft and they have earlier property convictions, they can be tried for the felony, petty theft with a prior. Andrade had three burglary convictions from 1983. It was conceded he had no violent priors in his record. As a result, Andrade was tried for two counts of petty theft with a prior.

Now, the irony is had Andrade's prior crimes been rape and murder, his maximum sentence would have been three years, eight months in jail because petty theft with a prior requires that the prior offenses be property crimes.

Well, it turns out that for Andrade that because of his prior convictions he was then tried under California's Three Strikes Law. Twenty-six states have Three Strikes Laws, but California's is unique. California is the only state where the third strike doesn't have to be a serious or a violent felony.

Because Andrade was convicted of two counts of petty theft with a prior, he was sentenced to life in prison with no possibility of parole for fifty years. Andrade filed an appeal to the California Court of Appeals, which was denied. The California Supreme Court denied review. Andrade filed a pro se habeas petition in Federal Court, which was denied, filed a pro se appeal to the Ninth Circuit. I was appointed to represent him in the Ninth Circuit. I did so successfully with the Ninth Circuit saying fifty years to life for shoplifting is cruel and unusual punishment.

The United States Supreme Court, however, in a five to four decision reversed. Likewise, in a companion case, *Ewing v. California*,[25] the Court said that shoplifting leading to a life sentence is not cruel and unusual punishment, even though this person's only crime was stealing three golf clubs.

If you think about the evolving standards of decency, it's hard to understand how the Supreme Court could uphold the sentence as imposed

---

[25] 538 U.S. 11 (2003).

on Andrade and Ewing. If you look at other punishments in California, at that time, the maximum punishment for rape was eight years in prison. The maximum punishment for manslaughter was eleven years in prison. The maximum sentence for second degree murder was fifteen years in prison. But Andrade got fifty years to life for stealing a hundred and fifty-three dollars worth of videotapes, and Ewing got twenty-five to life for stealing three golf clubs.

In no other state in the country could Andrade or Ewing have received these sentences. Justice Breyer in his dissenting opinion said he had researched it, and prior to California's Three Strikes Law, no one in the history of the United States had ever received a life sentence for shoplifting.

This morning I had the pleasure of speaking to the students taking Constitutional Law. I discussed more generally recent Supreme Court developments, and I talked about the *Andrade* and the *Ewing* cases. And I talked about being the lawyer who argued Andrade's case in the Supreme Court and in the Ninth Circuit, having represented him for three years and how devastating it felt and still feels that the Supreme Court upheld his life sentence. Had one justice come out the other way, Andrade would be free today. He's already served seven years for this shoplifting. Now he has to go forty-three more years before he's even eligible for parole.

I have another case involving an individual whose third strike was stealing a hundred and twenty-eight dollar television set from Wal-Mart. His prior two strikes were also nonviolent offenses.

After the *Andrade* case came down, his mother called me and said what do we do now. The answer is nothing. It was like being a doctor saying there's no hope, because there isn't any based on these decisions.

And yet if the Supreme Court is going to be true to *Atkins v. Virginia*, if it's going to really look to evolving standards of decency, then surely isn't a life sentence for shoplifting cruel and unusual punishment.

I've tried to paint a fairly optimistic picture overall this evening based on three recent cases. I don't want to exaggerate the optimism here. The problems with regard to the death penalty in the United States are enormous, and these three cases are just a start at reforming it.

Perhaps some day the United States will join the seventy-five countries throughout the world that already ban the death penalty in all circumstances. In fact, I'd go so far as to say there will be a point in American history when the death penalty will be abolished. I'm not sure if it's going to be in my lifetime, but I think it will happen; and perhaps when it happens, these three recent cases will be regarded as significant markers on the road to that more just society. Thank you.